

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ATLANTIC HOUSE YEMEN RESTAURANT, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1983	:	
through November 30, 1985.	:	

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Petitioner, Atlantic House Yemen Restaurant, Inc., c/o Francis L. Giordano, 26 Court Street, Brooklyn, New York 11242, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through November 30, 1985 (File No. 803700).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 21, 1989 at 1:15 P.M., with all briefs to be submitted by November 9, 1989. Petitioner appeared by Francis L. Giordano, Esq. The Division of Taxation appeared by William F. Collins, Esq. (C. Roger Jenkins, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly resorted to external indices in calculating and assessing additional tax liability against petitioner.

FINDINGS OF FACT

During the period in question petitioner, Atlantic House Yemen Restaurant, Inc., operated an Arabic-style restaurant located at 144 Atlantic Avenue in Brooklyn, New York.

On January 30, 1986, the Division of Taxation issued a letter to Atlantic House Yemen Restaurant, Inc. indicating that petitioner's sales tax returns for the period March 1, 1983 through November 19, 1985 would be subjected to a field audit. This letter advised petitioner that all books and records pertaining to its sales tax liability for said period should be available for review. The letter specified such records to include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all other sales tax records. Attached to this letter was a second page consisting of a checklist specifying records required for audit.

At the time of the audit appointment petitioner, by its accountant, was able to provide payroll records for the period January 2, 1984 through November 19, 1985, but no other records of the business. In the absence of any records other than payroll records, the auditor concluded that petitioner's records were inadequate for the purpose of conducting a detailed audit and,

hence, determined to use external indices in an effort to estimate petitioner's sales and its sales tax liability.

The auditor utilized petitioner's payroll records, and the amount shown thereon of \$34,585.00, in comparison to a Dun and Bradstreet Cost of Doing Business Survey pertaining to the restaurant industry. More specifically, the Dun and Bradstreet report utilized indicated that payroll constituted 15.52% of gross sales. Therefore, the auditor divided the payroll amount (\$34,585.00) by such 15.52% payroll factor to calculate estimated gross sales of \$222,841.00. Said amount was reduced by the amount of sales reported by petitioner per sales tax returns, resulting in unreported taxable sales of \$167,506.00. The auditor applied the tax rate then in effect against total adjusted taxable sales, calculating tax due in the amount of \$18,384.38. Reduction thereafter by the amount of tax paid per returns (\$4,564.64), resulted in an unpaid sales tax liability of \$13,819.93.

In addition to the foregoing, the auditor obtained information relative to the November 19, 1985 sale of the subject business. More specifically, the auditor determined that the selling price of the business (per a bulk sale notification received by the Division of Taxation) included the sale of fixed assets valued at \$25,000.00. The auditor was unable to confirm that sales tax had been paid on any of such fixed assets at the time of their acquisition, and thus imposed tax of \$2,062.50 thereon, based on the stated \$25,000.00 value of such assets.

On February 20, 1986, the Division of Taxation issued to petitioner, Atlantic House Yemen Restaurant, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax due in the amount of \$15,882.43, plus penalty (Tax Law § 1145[a][1]) and interest. This notice was premised upon the results of the field audit of petitioner as described above.

No documentary evidence, including source documents or otherwise, was offered by petitioner at hearing. Petitioner's accountant offered testimony as to his opinion that the sales tax returns filed by petitioner were accurate. He testified that said returns were prepared based on "slips of paper" reflecting petitioner's monthly sales as given to petitioner's accountant by its sole owner and operator, one Alawi Almontaser. Petitioner's accountant testified, based on his visits to the restaurant both to perform accounting services and to dine, that the restaurant "rarely did much business or made money." He testified that the restaurant was operated essentially on a "give away" basis and was kept open "only for the purpose of ultimately selling and/or renting the premises." On the basis of such testimony, petitioner takes the position that the Dun and Bradstreet payroll factor utilized by the auditor was unrealistic and inappropriate for application to this taxpayer given its method of operation.

### CONCLUSIONS OF LAW

A. Where a vendor such as petitioner fails to maintain and/or make available upon request for audit complete, accurate and adequate records of its sales, the Division of Taxation may resort to indirect methodologies, including external indices, in arriving at a determination of that vendor's sales and use tax liability (Tax Law §§ 1138[a]; 1142.5; 1135; see, e.g., Matter of Mera Delicatessen, Inc. and Emil Mekhail, as Officer, Tax Appeals Tribunal, November 2, 1989). Here, the record makes clear that petitioner supplied none of the records legitimately requested by the Division for purposes of conducting an audit. Further, petitioner provided no evidence at hearing that its records were at any time maintained or available in a complete, adequate or accurate fashion, and in fact gave indications to the contrary. Therefore, the auditor was clearly justified in resorting to external indices in arriving at a determination of petitioner's tax liability.

B. Petitioner offered neither evidence nor any argument upon which to conclude that the methodology employed in this case was unreasonable or to support cancellation or reduction of the assessment as issued. It is noted that where a taxpayer's own failure to maintain adequate and accurate records results in resort to external indices, accuracy is not a prerequisite to issuance of an assessment and any inaccuracy resulting therefrom weighs against petitioner (Matter of Meskouris Brothers, Inc. v. Chu, 139 AD2d 813). Petitioner's general assertions that the sales tax returns were accurate as filed, and that the index used was not appropriate are both unpersuasive and unsupported on the facts of this case. Petitioner's arguments in no way excuse petitioner's failure to have maintained records and made them available when requested.

C. Petitioner has advanced no facts upon which to conclude that there existed reasonable cause for its failures such as to eliminate or reduce the penalty assessed.

D. The petition of Atlantic House Yemen Restaurant, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 20, 1986, together with such penalty and interest as is lawfully owing, is sustained.

DATED: Troy, New York  
December 28, 1989

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE